CLERK'S OFFICE 7108

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~286~~ 54.

E. M. CALDWELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA AND THE CITY OF GREENSBORO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED MARCH 7, 1901.

(18,073.)

(18,073.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 266.

E. M. CALDWELL, PLAINTIFF IN ERROR.

vs.

THE STATE OF NORTH CAROLINA AND THE CITY OF GREENSBORO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 3, 1901.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of North Carolina, before you, or some of you, being the highest court of law or equity of said State, in which a decision could be had in said suit between State of North Carolina and City of Greensboro and E. M. Caldwell, in which the said E. M. Caldwell was appellant, wherein was drawn in question the validity of a statute, or an authority exercised under, of said State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity; and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, all of which appears in the record and proceedings in said suit, manifest error hath happened, to the great damage of the said E. M. Caldwell, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have
2 the same at Washington, within thirty days from the date of this writ in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 5th day of February, in the year of our Lord nineteen hundred and one.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

Allowed.
D. M. FURCHES,
Chief Justice of Supreme Court of North Carolina.

3 UNITED STATES OF AMERICA, *ss:*

To the State of North Carolina and City of Greensboro, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on March 4th next, pursuant to a writ of error filed in the clerk's office

of the supreme court of the State of North Carolina, wherein E. M. Caldwell is the plaintiff and The State of North Carolina and The City of Greensboro are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable D. M. Furches, chief justice of the supreme court of North Carolina, this 5th day of February, in the year of our Lord nineteen hundred and one.

D. M. FURCHES,
Chief Justice.

Service of the above citation and receipt of a copy thereof admitted. This Feb'y 5th 1901.

ROBT D. GILMAN,
Attorney General for the State of North Carolina.

Service of the above citation accepted this the 9th day of Feb. 1901.

A. M. SCALES,
Att'y for City of Greensboro.

4 E. M. CALDWELL, Plaintiff in Error,
vs.
THE STATE OF NORTH CAROLINA and THE CITY OF GREENSBORO, Defendants in Error.

Know all men by these presents that we, E. M. Caldwell, as principal, A. W. Witherall and T. H. Main, as sureties, are held and firmly bound unto the defendants, The State of North Carolina and The City of Greensboro, in the full and just sum of five hundred ($500) dollars to be paid to the said defendants, The State of North Carolina and The City of Greensboro, their successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated 24th day of December in the year of our Lord nineteen hundred.

Whereas, lately in the supreme court of the State of North Carolina, in a suit pending in said court between The State of North Carolina and The City of Greensboro, plaintiffs, and E. M. Caldwell, defendant, judgment was rendered against the said E. M. Caldwell, and the said E. M. Caldwell having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of North Carolina and City of Greensboro, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the fourth day of March next: Now, the condition of the above obligation is such that if the said E. M. Caldwell shall prosecute the said

writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

E. M. CALDWELL. [SEAL.]
A. W. WITHERELL. [SEAL.]
T. H. MAIN. [SEAL.]

Sealed and delivered in presence of:

—— ——.

5 STATE OF ILLINOIS, }
County of Cook. }

CHICAGO, *Dec.* 24, 1900.

A. W. Witherell being duly sworn says that he is worth the sum of one thousand dollars, over and above all his just debts and liabilities and in excess of his homestead and personal property exemption.

Subscribed and sworn before me this 24th day of December A. D., 1900.

[L. S.]

W. F. DUNHAM,
Notary Public.

STATE OF ILLINOIS, }
County of Cook. }

T. H. Main being duly sworn says that he is worth the sum of one thousand dollars, over and above all his just debts and liabilities and in excess of his homestead and personal property exemption.

Subscribed and sworn to before me this 24th day of December A. D., 1900.

[L. S.]

W. F. DUNHAM,
Notary Public.

Approved by
D. M. FURCHES,
Chief Justice of the Supreme Court of North Carolina.

(Writ of error, citation and bond filed in the supreme court of North Carolina on February 11, 1901.)

6 *Warrant.*

STATE and CITY OF GREENSBORO *against* E. M. CALDWELL. } No. 1257. Before Z. V. Taylor, Mayor. Warrant for Delivering Pictures.

STATE OF NORTH CAROLINA:

To the chief of police of the city of Greensboro or other lawful officer of Guilford county, Greeting:

Whereas, complaint has been made before me this day on the oath of J. W. Cates that E. M. Caldwell, on or about the 20th day of April, 1900, with force and arms, at and in the county aforesaid

and within the city limits, did wilfully, maliciously and unlawfully engage in the business of delivering pictures without first having obtained a license so to do, against the statute in such cases made and provided, against the peace and dignity of the State, and in violation of the city ordinances. Sec. —, chap. —, page —.

J. W. CATES,
Complainant.

Subscribed and sworn to before me this 21st day of April, 1900.
[SEAL.] Z. V. TAYLOR, *Mayor.*

These are therefore to command you forthwith to apprehend the said E. M. Caldwell and him have before me at the mayor's office, then and there to answer the said charge, and be dealt with according to law.

Given under my hand and seal this 21st day of April, 1900.
[SEAL.] Z. V. TAYLOR, *Mayor.*

Special Verdict.

That on the — day of ——, 1900, the defendant, being employed by the Chicago Portrait Company, a foreign corporation, of Chicago, Ill., came to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employees of the Chicago Portrait Company, who had preceded the defendant in Greensboro;

That the defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., addressed to the Chicago Portrait Company, carried these packages to the rooms of the defendant in the Woods house, a hotel in the city of Greenboro, and there broke the bulk, placing said pictures in their proper frames and from this point delivered the pictures one at a time to the purchasers in the city of Greensboro;

The defendant had been engaged in this work two days when arrested;

7 That section 57 of the charter of the city of Greensboro, N. C., is as follows: "That in addition to the subjects listed for taxation, the aldermen may levy a tax on the following subjects, the amount of which tax, when fixed, shall be collected by the collector of taxes, and if it be not paid on demand, the same may be recovered by suit, or the articles upon which the tax is imposed, or any other property of the owner may be forthwith distrained and sold to satisfy the same, namely:

"21. Upon all subjects taxed under Schedule B, chapter one hundred and thirty-six, Laws of North Carolina, session of one thousand eight hundred and eighty-three, not heretofore provided for, shall pay a license or privilege tax of ten dollars. And the board of aldermen shall have power to impose a license tax on any business carried on in the city of Greensboro, not before enumerated herein, not to exceed ten dollars a year."

The business mentioned in the ordinance following is not named in the charter of the city, other than in the above section.

That the following is an ordinance duly passed by the board of aldermen of the city of Greensboro under and by virtue of the foregoing section of said charter, and prior to any of the orders being taken:

"Be it ordained by the board of aldermen of the city of Greensboro, North Carolina:

"That every person engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of ten dollars for each year.

"Any person engaging in said business without having paid the license tax required herein, shall be fined twenty dollars, and each and every sale or delivery shall constitute a separate and distinct offense."

That neither the defendant, The Chicago Portrait Company, nor any of the employees of the Chicago Portrait Company have paid the city any license tax.

If, upon the foregoing facts, the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise they say that he is not guilty.

8 STATE and CITY OF GREENSBORO *against* E. M. CALDWELL.

Upon the foregoing special verdict it is adjudged that defendant is guilty, and that he pay a fine of $20.00 and costs of this action.

Motion for new trial for errors occurring during trial. Motion denied; defendant excepts; judgment; defendant again excepts and appeals to supreme court. Notice of appeal waived. Undertaking on appeal fixed at $35.00. By consent defendant allowed thirty days to serve case on appeal; solicitor allowed thirty days thereafter to serve counter-case.

STATE OF NORTH CAROLINA, *Guilford County.*

In the Superior Court, June Term, 1900.

STATE and CITY OF GREENSBORO *against* E. M. CALDWELL. — Statement of Defendant's Case on Appeal.

This was an action tried before Moore, judge, and a jury at the June term, 1900, of Guilford superior court.

Proceedings were commenced against the defendant by the issuing of a warrant by the mayor of Greensboro on the 21st day of

April, 1900, on the complaint of J. W. Cates. Said warrant was returnable before said mayor of Greensboro at his office on said 21st day of April, 1900. Upon the hearing before the said mayor of Greensboro defendant was adjudged guilty of engaging in the business of delivering pictures without first having obtained a license so to do and it was adjudged that he pay a fine of ten dollars and costs.

From this judgment the defendant appealed to the superior court.

Upon the trial in the superior court the jury found a special verdict. Upon the facts set out in said special verdict the court instructed the jury that they should find the defendant guilty. Defendant excepted. Verdict of jury was guilty. The judgment in the mayor's court was affirmed and the judgment of the superior court was that defendant pay a fine of ten dollars and costs. There was a motion for a new trial, which motion was overruled and defendant excepted. From the judgment rendered an appeal was taken to the supreme court.

The defendant assigned as grounds of error :

I. The facts set out in the special verdict do not make defendant guilty of engaging in the business of delivering pictures without first having obtained a license so to do—within the purview and contemplation of the ordinance of the city of Greensboro.

II. That should defendant be held liable under the ordinance in controversy, said ordinance is unconstitutional, being in conflict with article I, section 8, of the Constitution of the United States, being an interference with, and an attempt to regulate commerce among the States and a burden upon the same.

9 The warrant, special verdict, docket entries and clerk's certificate of deposit in lieu of appeal bond for costs, with defendant's statement of case on appeal will constitute case on appeal.

CHARLES M. STEDMAN,
Attorney for Defendant.

Statement of defendant's case on appeal admitted to be correct and adopted as case on appeal this — of September, 1900.

A. L. BROOKS, *Solicitor.*

Bond.

NORTH CAROLINA, }
Guilford County. }

I, Jno. J. Nelson, clerk of the superior court in and for said county, do hereby certify that E. M. Caldwell has deposited with me the sum of thirty-five dollars in lieu of appeal bond to supreme court. Witness my hand and seal this —— —, 1900.

—— ——.

NORTH CAROLINA, }
Guilford County. }

I, John J. Nelson, clerk of the superior court of said county, do hereby certify that the foregoing is a true and perfect copy of the

record and case on appeal in case State *vs.* E. M. Caldwell. In witness whereof I have hereto set my hand and official seal at office in Greensboro, N. C., this —— —, 1900.

JNO. J. NELSON, *C. S. C.* [SEAL.]

Service of defendant's statement on appeal made and accepted in due time.

SCALES & SCALES.

(Docket entries.—Appeal docketed Oct. 22, 1900. Argued Oct. 27, 1900, by attorney general and Scales & Scales for plaintiff and C. M. Stedman for defendant. Opinion handed down November 7, 1900.)

10 N. C. Supreme Court, Sept. Term, 1900, Guilford County.

STATE & THE CITY OF GREENSBORO
v.
E. M. CALDWELL, Appellant. } # 172.

Chas. M. Stedman for appellant; attorney general and Scales & Scales for appellee.

FURCHES, *J.*:

This is a prosecution for an alleged violation of an ordinance of the city of Greensboro. There was no objection or exception to the manner in which it was commenced, and it may be maintained if the defendant has violated the city ordinance, State *v.* Higgs, 126 N. C. 1014, unless the ordinance is in contravention of the doctrine of interstate commerce, and therefore is unconstitutional.

The case comes to this court on appeal of defendant from the judgment of the court below upon the following special verdict:

"That on the — day of ——, 1900, the defendant, being employed by the Chicago Portrait Company, a foreign corporation, of Chicago, Ill., came to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employees of the Chicago Portrait Company, who had preceded the defendant in Greensboro;

That the defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., addressed to the Chicago Portrait Company, carried these packages to the rooms of the defendant in the Woods house, a hotel in the city of Greensboro, and there broke the bulk, placing said pictures in their proper frames and from this point delivered the pictures one at a time to the purchasers in the city of Greensboro;

The defendant had been engaged in this work two days when arrested;

That section 57 of the charter of the city of Greensboro, N. C., is as follows: 'That in addition to the subjects listed for taxation, the aldermen may levy a tax on the following subjects, the amount of which tax, when fixed, shall be collected by the collector of taxes,

and if it be not paid on demand, the same may be recovered by suit, or the articles upon which the tax is imposed, or any other property of the owner may be forthwith distrained and sold to satisfy the same, namely:

'21. Upon all subjects taxed under Schedule B, chapter one hundred and thirty-six, Laws of North Carolina, session of one thousand eight hundred and eighty-three, not heretofore provided for, shall pay a license or privilege tax of ten dollars. And the board
11 of aldermen shall have power to impose a license tax on any business carried on in the city of Greensboro, not before enumerated herein, not to exceed ten dollars a year.'

The business mentioned in the ordinance following is not named in the charter of the city, other than in the above section.

That the following is an ordinance duly passed by the board of aldermen of the city of Greensboro under and by virtue of the foregoing section of said charter, and prior to any of the orders being taken:

'Be it ordained by the board of aldermen of the city of Greensboro, North Carolina:

'That every person engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid, shall pay a license tax of ten dollars for each year.

'Any person engaging in said business without having paid the license tax required herein, shall be fined twenty dollars, and each and every sale or delivery shall constitute a separate and distinct offense.'

That neither the defendant, The Chicago Portrait Company, nor any of the employés of the Chicago Portrait Company, have paid the city any license tax.

If, upon the foregoing facts, the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise they say that he is not guilty."

12 Upon this special verdict the court held that the defendant was guilty, the verdict was so entered, and the defendant fined $20. From this verdict and judgment the defendant excepted and appealed to the supreme court. The defendant assigns as ground of error:

1. The facts set out in the special verdict do not make the defendant guilty of engaging in the business of delivering pictures without first having obtained a license so to do—within the purview and contemplation of the ordinance of the city of Greensboro.

2. That should defendant be held liable under the ordinance in controversy, said ordinance is unconstitutional, being in conflict with article I section 8 of the Constitution of the United States, being an interference with, and an attempt to regulate commerce among the States, and a burden upon the same.

We will consider these assignments in the order in which they

are stated, for if the defendant has not been guilty of carrying on a business in violation of the city ordinance, then he is guilty of no offence—is not guilty—and there is nothing for the second assignment to rest upon.

It seems to us that a good way to test this exception is to divest our minds of the fact that the defendant was the agent of the Chicago Portrait Company, and to consider him as a citizen of Greensboro, who had bought these pictures and had them shipped to him in the unfinished state they were. And he had taken them to his house, opened them, assorted and put them together, and then sold and delivered them to parties in town; would he not have been a dealer engaged in selling and delivering pictures and picture frames in violation of the ordinance? We think he would, and would be guilty, would be unless he is protected by the reason of the unconstitutionality of the ordinance, as stated in the second assignment of error. And it being claimed in this assignment that it involves a constitutional question, that it is in violation of "article I section 8 of the Constitution of the United States, being an interference with, and an attempt to regulate commerce among the
13 States and a burden upon the same," it becomes an important question and should be well considered. This has been well done by arguments of the learned counsel and the well-considered brief of defendant.

It is contended in this brief that no State has a right to levy a tax on interstate commerce, and for this Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196 and Crutcher *v.* Kentucky, 141 U. S. 47 are cited. This position is true. And the defendant then contends that this ordinance is unconstitutional because it levies a tax on interstate commerce. For this position he cites quite a number of cases which he says sustain it. Among them, we will only mention those apparently most relied on. Robbins *v.* Shelby Taxing District, 120 U. S. 480; Brennan *v.* Titusville, 153 U. S. 289; Adkins *v.* Richmond 47 L. R. A. 583. The proposition of law contended for is undisputedly true, that a State cannot tax interstate commerce. The trouble is not in not being able to understand this rule of law, but in applying it.

The defendant insists that Brennan *v.* Titusville, *supra* is directly in point—is in every essential fact this case—and should control the opinion of the court in this appeal. And it is in many respects like this case, but there is one material difference between that case and this, which marks the distinction. In that case, the goods were shipped directly to the purchaser. In this case, they were shipped by the Chicago Company to itself in the city of Greensboro; and when they reached Greensboro, the defendant as the agent of the Chicago Company received them from the railroad at its depot, carried them to their rooms in Greensboro, opened the boxes in which they were shipped, took out the pictures and picture frames, assorted and put them together and delivered them to the purchasers in the city of Greensboro, and had been engaged in this work two days when arrested. If they had been completed and shipped directly to the parties for whom they were intended, this

case would have fallen within the decision of Brennan *v.* Titusville, *supra*, and we should hold, as it was held there, that it was
14 an interference with interstate commerce and that the defendant was not guilty.

But to our minds there is a decided difference between this case and that. The contract to make and deliver these pictures was an executory contract; and no title passed by this contract. Tiedman on Sales, sects. 88, 89; Empire Drill Co. *v.* Allison, 94 N. C. 548. If they had been completed in Chicago, and under contract shipped to the purchaser, the title would have passed to the consignee upon delivery to the railroad in Chicago—the railroad being deemed to be the agent of the consignee, State *v.* Groves, 121 N. C. 632, Railroad *v.* Barns, 104 N. C. 25, and Brennan *v.* Titusville, *supra*, would have applied, as the tax would have been upon the commerce. But, instead of completing the pictures in Chicago and shipping them to the parties who had contracted for them, they were shipped to themselves—"The Chicago Portrait Company"—in Greensboro. This being so, no title ever passed from the Chicago Portrait Company, until the pictures were put in the frames and delivered by the defendant. These pictures belonged to the Chicago Company when they were shipped from Chicago, and belonged to it when they got to Greensboro. And the question is, could the Chicago Portrait Company, because it was a foreign corporation, engage in the business of completing these pictures, and in selling and delivering them in Greensboro, without becoming liable for a city tax, for which its own citizens would be liable? It seems to us that it could not. This case seems to fall under the doctrine of Emmett *v.* Missouri, 156 U. S. 296 and Range Co. *v.* Carver, 118 N. C. 328. There was no sale—no title passed from the Chicago Portrait Company until the pictures were completed and delivered to the purchasers.

We are therefore of the opinion that the defendant was engaged in the business of selling and delivering pictures and picture frames in the city of Greensboro; and, as we are not able to see how the enforcement of this ordinance interferes with interstate commerce, the judgment of the court below is affirmed.

15 CLARK, *J.*, dissenting:

The orders for the portraits and frames were taken in Greensboro by the travelling agent of a Chicago firm. If the portraits made in Chicago in consequence of such contract had each been sent direct to the person for whom it was made this would have been interstate commerce. This feature of the transaction is not changed by the fact that a batch of portraits was sent "knocked down" to Greensboro, the frames and portraits packed separately, and were by another agent of the shipper who came to Greensboro for that purpose from Chicago put together, each portrait in its frame. This was simply an economical method of transportation. There is no new contract with the customer. There was no "breaking of bulk" in the legal meaning of the term, for each article though shipped with others kept its individuality. Each portrait could be of use only to the person for whom it had been made and was as distinctly

severed from the rest by that fact as if it had been sent in a separate cover. The only contract was that between the Chicago firm's agent in the first instance and the customer. The title does not pass until the picture is approved and paid for. This is the same case as Robbins *v.* Shelby Taxing District, 120 U. S. 480, in which it was held that the business of offering for sale, or selling, goods to be shipped to the buyer from another State is interstate commerce. This is not the case of State *v.* French, 109 N. C. 722 or State *v.* Wessell, *id.*, 735, in which the goods were bought in another State, shipped here in bulk, and then by the buyer were sold to his customers. The sale by such buyer to his customers was a North Carolina business and taxable. But here the only "dealing" is between the Chicago house through its agent with a customer here and the shipping of the identical article to an agent in Greensboro whose sole duty is to complete the delivery upon payment of the purchase-money.

At the end of the dissenting opinion, is the following:

"FAIRCLOTH, *C. J.*:

I concur in the above."

16 (Title of Cause.)

Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of Guilford county; upon consideration whereof, this court is of opinion that there is no error in the record and proceedings of the said superior court. It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable D. M. Furches, justice, be certified to the said superior court, to the intent that the judgment be affirmed. And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this court incurred, to wit, the sum of twenty $\frac{70}{100}$ dollars ($20.70) and let execution issue therefor.

NORTH CAROLINA, }
Supreme Court. }

I, Thomas S. Kenan, clerk of the supreme court of the State of North Carolina, do hereby certify the foregoing to be a full, true and correct transcript of the record on file in this court in an action entitled "State and City of Greensboro against E. M. Caldwell."

In witness whereof I have hereto set my hand and affixed the seal of said court, at office, in Raleigh, this 19th day of February, 1901.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk of Supreme Court of North Carolina.

Endorsed on cover: File No. 18073. North Carolina Supreme Court. Term No. 266. E. M. Caldwell, plaintiff in error, *vs.* The State of North Carolina and The City of Greensboro. Filed March 7th, 1901.

Office Supreme Court U. S.
FILED
MAR 29 1902
JAMES H. McKENNEY,
Clerk.

No. 266.

Br. of Stedman & Plum for P.

BRIEF OF PLAINTIFF IN ERROR.

Filed Mar. 29, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

NO. 266.

E. M. CALDWELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA AND THE CITY OF GREENSBORO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

CHAS. M. STEDMAN,

W. R. PLUM,

Attys for Pltff in Error.

BRIEF OF PLAINTIFF IN ERROR.

Supreme Court of the United States.

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E. M. CALDWELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA AND THE CITY OF GREENSBORO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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STATEMENT OF FACTS.

The defendant, who was an employee of the Chicago Portrait Company, a foreign corporation of Chicago, Illinois, came to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale (said pictures and frames being in Chicago when said contracts were negotiated) had previously been made by other employees of the Chicago Portrait Company, who had preceded the defendant to Greensboro. The defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., for the purpose of delivery to different parties in Greensboro, who had made the contracts aforesaid with employees of the Chicago Portrait Company. The packages containing the frames and pictures were addressed to the Chicago Portrait Company. They were taken to the rooms of the defendant in a hotel in Greensboro and opened, the pictures placed in their proper frames and delivered one at a time to the purchasers in Greensboro. The defendant had been engaged in the work two days when arrested. Defendant sold no picture frames, pictures, photographs or likenesses of the human face and delivered none except to the purchasers in Greensboro who had negotiated for them with other employees of the Chicago Portrait Company who had preceded the defendant to Greensboro. Defendant was arrested and adjudged guilty of violating the ordinance of the City of Greensboro set out in the record.

ASSIGNMENTS OF ERROR.

Defendant assigned as grounds of error:

1. The facts set out in the special verdict do not make defendant guilty of engaging in the business of delivering pictures without first having obtained a license so to do—within the purview and contemplation of the ordinance of the City of Greensboro.

2. That should defendant be held liable under the ordinance in controversy said ordinance is unconstitutional, being in conflict with Article I, Section 8, of the Constitution of the United States, being an interference with and an attempt to regulate commerce among the States and a burden upon the same.

ARGUMENT.

It is immaterial that the Chicago Portrait Company is a corporation. Whilst it is true that a foreign corporation is not a citizen of another State and can claim no privilege or protection under Article IV., Section 2, of the Constitution of the United States, yet it is now firmly settled that inter-State commerce by a corpor-

ation is entitled to the same protection as when carried on by individuals.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196.
Crutchen vs. Kentucky, 141 U. S., 47.

"No State has the right to levy a tax on inter-State commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation or on the occupation or business of carrying it on for the reason that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

It follows, of course, that as a State cannot levy such a tax a municipal corporation, a creature and agency of the State, cannot do so.

Lyng vs. Michigan, 135 U. S., 165.
Leloup vs. Port of Mobile, 127 U. S., 640.
Gibbons vs. Ogden, 9 Wheaton, 1.
State Freight Tax Cases, 15 Wallace, 232-279.
Robbins vs. Shelby Taxing District, 120 U. S., 480.
Brennan vs. Titusville, 153 U. S., 289-303.
Stoutenburg vs. Hennick, 129 U. S., 141-148.
Asher vs. Texas, 128 U. S., 129.
Freight Discrimination Cases, 95 N. C., 428-434.
State vs. French, 109 N. C., 722.
Adkins vs. City of Richmond, 47 L. R. A., 583.

Machine Co. vs. Gage, 100 U. S., 676; Emert vs. Missouri, 156 U. S., 296; State vs. French, 109 N. C., 722; Range Co. vs. Carver, 118 N. C., 328; Hopkins vs. United States, 171 U. S., 578; May vs. New Orleans, 178 U. S., 496; Austin vs. State of Tennessee, 179 U. S., 132; are no departure, as thought by some, from the rule of decisions so firmly established by the Supreme Court of the United States.

Machine Co. vs. Gage was an action brought by the Howe Sewing Machine Company, a Connecticut corporation, which had shipped its machines to Nashville, Tennessee, and from there an agent went to Sumner County to peddle and sell these machines. That was purely "Intra-State" Commerce. The fact that the trade or occupation of peddling the machines was exercised in Tennessee after the situs was changed from Connecticut to Tennessee and the machines became intermingled with the general mass of property of the latter State takes away entirely the "Inter-State Commerce" feature.

The decision in Machine Co. vs. Gage, as to a peddler carrying with him for sale goods already in the State, was recognized and distinguished by Mr. Justice Bradley in delivering the opinion in

Robins vs. Shelby Taxing District, from the case then before the Court of a drummer selling or soliciting orders for goods which were at the time in another State.

In Emert vs. Missouri "The defendant's occupation was offering for sale and selling sewing machines by going from place to place in the State of Missouri in a wagon without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods or of any order for their transfer from one State to another and were neither inter-State commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic, and so far as appears the only goods in which he was dealing had become part of the mass of property within the State."

The above quotation is taken from the opinion of Mr. Justice Gray in Emert vs. Missouri.

Range Co. vs. Carver, 118 N. C., 328, involved the constitutionality of a tax on peddlers imposed by Sec. 28, Chapter 116, Public Laws of 1895. The section reads as follows:

"On every itinerant person or company peddling clocks, stoves or ranges one hundred dollars annually on each wagon, 'if wagons are used,' in each county where he or they may peddle. If wagons are not used the tax shall be paid on each agent."

Peddlers going from county to county selling clocks, stoves, or ranges already in the State, as is evidently contemplated by the statute, do an "intra-State" and not an inter-State business, it matters not where the article so peddled and sold came from originally. This case is identical with Machine Co. vs. Gage. Mr. Justice Furches, in delivering the opinion of the Court, says:

"The case of Machine Co. vs. Gage was almost our case. If there is any distinction in the principle there decided and the case now before us we have been unable to discover it after a careful examination."

In State vs. French, Mr. Justice Clarke, who delivered the opinion of the Court, says:

"Under the decisions of the Supreme Court of the United States, if the 'business,' the carrying on of which is made liable to the tax, was that of inter-State commerce, such as offering for sale or selling goods in one State to be shipped to the buyer, who is in another State, such tax would be inhibited. The tax is not on any dealings between the parties outside of the State and the defendants within the State, nor on the transportation of goods into the State. The business taxed and intended to be taxed is that of buying and selling goods, wares and merchandise, that is, carrying on a mercantile tax in this State."

In State vs. French, defendants purchased goods in other States,

brought them into this State and *sold* them here, but made no purchase within the State. Such commerce was clearly "intra-State." It was carried on in this State between the defendants and other parties in the State. *The inter-State dealings were terminated when the goods were delivered at the store of the defendants.* The business subsequently carried on of vending and disposing of them is "intra-State" traffic upon which the State can levy its license tax.

The case of Hopkins vs United States, 171 U. S., 578, is relied upon by some as an authority in conflict with Lyng vs. Michigan, Robbins vs. Shelby Taxing District, Brennan vs. Titusville and the line of cases cited in this brief. But an analysis will show no conflict. In Hopkins vs. the United States the relief sought was based on an act of Congress entitled, "An Act to protect trade and commerce against unlawful restraints and monoplies," and the bill was filed against certain residents of the State of Kansas who were members of a voluntary un-incorporated association known and designated as the Kansas City Live Stock Exchange. It was alleged that the members of the Exchange had adopted for their government certain articles of association rules and by-laws, which were in restraint of trade and commerce between the States It was held otherwise, but it will be seen running through the opinion of the Court that stress was laid upon the fact that the business of the members was wholly concerned with buying and selling live stock after their arrival at Kansas City, and that the distinction made in the cases heretofore cited between the sale and offer to sell in one State property which is situated in another State and the sale of property after it has been brought into the State in which the sale is negotiated was kept steadily in view—the one being inter-State commerce and subject only to the regulation of Congress, and the other being domestic and subject to legislation by the State.

In F. May & Co., plaintiffs in error, vs. The City of New Orleans, Mr. Justice Harlan in delivering the opinion of the Court said: "We have seen that the plaintiffs in effect contend that having paid the duties imposed by the United States they were entitled without liability to taxation upon the goods as property to open the boxes in which the separate parcels of goods were transported and put such separate parcels in the hands of agents to be sold wherever in the State or the country customers could be found. The separate parcels—such is the effect of the argument—are not to be deemed incorporated into the mass of the property of the State while thus being carried around the country by the importer's agent—no separate parcel, so long as it remained in the particular form in which it was packed in a box or case with other parcels, ceasing to have the character of an import until after it was sold by such agent. This proposition cannot be sustained. We cannot doubt that the goods when placed in the hands of agents for

sale in separate parcels have been so acted upon by the importer that they have ceased to be imports and have become part of the mass of the property of the State liable to local taxation. But, what is the difference in principle between the case of sales by an importer through a traveling agent and the case of an importer who opens the box or case in which his goods, wrapped in separate parcels, were imported, and, by employees, sells, or offers to sell, the separate parcels, either from the open box or case in his store or from shelves or counters upon which such parcels have been placed for examination and sale?"

The conclusion of the Court was that the goods imported by C. F. May & Co. "lost their distinctive character as imports and became a part of the general mass of the property of Louisiana and subject to local taxation as other property in the State the moment the boxes, cases, or bales in which they were shipped reached their destination for use or trade, and were opened, and the separate packages therein exposed or offered for sale; consequently, the assessment in question was not in violation of the Constitution of the United States.

The facts in the case at bar are entirely different and are clearly and accurately stated in the dissenting opinion of Mr. Justice Clark, in which Chief Jnstice Faircloth concurred. "The orders for the portraits and frames were taken in Greensboro by the traveling agent of a Chicago firm. If the portraits made in Chicago in consequence of such contract had each been sent direct to the person for whom it was made, this would have been inter-State commerce. This feature of the transaction is not changed by the fact that a batch of portraits was sent "knocked down" to Greensboro, the frames and portraits packed separately, and were, by another agent of shipper, who came to Greensboro for that purpose from Chicago, put together, each portrait in its frame. This was simply an economical method of transportation. There is no new contract with the customer. There was no "breaking of bulk" in the legal meaning of the term, for each article, though shipped with others, kept its individuality. Each portrait could be of use only to the person for whom it had been made, and was as distinctly severed from the rest by that fact as if it had been sent in a separate cover. The only contract was that between the Chicago firm's agent, in the first instance, and the customer. The title does not pass until the picture is approved and paid for. This is the same case as Robbins vs. Taxing District, 120 U. S., 480, in which it was held that the business of offering for sale or selling goods to be shipped to the buyer from another State is inter-State commerce. This is not the case of State vs. French, 109 N. C., 722, or State vs. Wessell, 109 N. C., 735, in which the goods were bought in another State, shipped here in bulk, and then by the buyer was sold to his customers. The sale by such buyer to his customers was a North Carolina business and taxable. But here the only "dealing" is

between the Chicago house, through its agent with a customer here, and the shipping of the identical article to an agent in Greensboro, whose sole duty is to complete the delivery upon payment of the purchase money."

William B. Austin, Plaintiff in Error, vs. The State of Tennessee, 179 U. S., 343. In this case it was decided that paper packages of cigarettes, each three inches in length and one and one-half inches in width, containing ten cigarettes, without any shipping address on such packages, when they are taken from a loose pile of such packages at the factory by an express company, in a basket which it furnishes, in which it carries them, and from which it empties them on the counter of a consignee in another State do not constitute original packages of inter-State commerce, but if there is any original package in the shipment it is the basket.

The decisive question in this case was whether each particular parcel of cigarettes was an original package within the constitutional import of those words as defined by the previons adjudications of the courts. This issue was answered in the negative. Mr. Justice White concurred in the majority opinion, "not only from the size of each particular parcel, but from all the other surrounding facts and circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each and the fact that many parcels for the purpose of commercial shipment were aggregated, thrown into and carried in an open basket. Thus associated in their shipment they could not under all the facts and circumstances of the case, after arrival, be segregated so as to cause each to become an original package."

This was a very extraordinary case in many respects. There were many facts connected with it which, in the opinion delivered by Mr. Justice Brown, furnished strong evidence of fraud.

In Com. vs. Schollenberger, 156 Pa., 201, 22 L. R. A., 155, 27 Atl., 30, an original package is defined to be "such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce." To the casual observer the method of transportation adopted in this case would seem to have been intended rather for the purpose of unlawful traffic than for convenience in handling and security in transportation of merchandise. And such seemed to be the view of the transaction as expressed in the majority opinion of the Court.

No such facts will be found and no such surroundings in the case at bar. Here there is no such suggestion of fraud in any respect. The method of transportation secured convenience, economy and safety for the merchandise. Each portrait and frame retained its distinctive identity. They could be of use only for the person for whom they had been made and they were as completely severed from the rest by that fact, as if they had been sent in

separate cover. There is no analogy between a box of portraits and frames, each intended for a particular person, and a basket of loose cigarette packages with no address on any package and each without any identity in the general mass.

Inter-State commerce cannot be taxed at all by the State.

It is not a material point in the case that no discrimination is made between domestic persons and citizens of another State "engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face in the city of Greensboro," that all are taxed alike. Inter-State commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the State.

Robbins vs. Shelby Taxing District, 120 U. S., 489.
The State Freight Tax, 15 Wallace, 232.

A tax on the occupation of doing a business is a tax on the business.

Leloup vs. Mobile, 127 U. S., 640–645.
Welton vs. Missouri, 91 U. S., 275–278.
Brown vs. Maryland, 12 Wheaton, 419–444.

The tax imposed is not exacted in the exercise of the police, but of the taxing power, and is for revenue purposes.

This will manifestly appear from an examination of Section 57 of the Charter of the City of Greensboro, also Section 21 and the ordinance in question, all of which are set out in the record.

If it be claimed that the ordinance in controversy is a regulation made in the exercise of the police power of the State under that guise it cannot be made a direct burden and obstruction to inter-State commerce.

Brennan vs. Titusville, 153 U. S., 289.
New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650–661.
Henderson vs. Mayor of New York, 92 U. S., 259.
Railroad Co. vs. Husen, 95 U. S., 465.
Walling vs. Michigan, 116 U. S., 446–460.
Minnesota vs. Barbour, 136 U. S., 313.

It surely will not be seriously controverted that contracts for the sale of pictures and frames made by employees of a foreign corporation in Chicago, said pictures and frames being at the time in Chicago, said employees coming to Greensboro for the purpose of

making said sale and said pictures and frames coming to Greensboro afterwards in pursuance of said contract is not inter-State commerce. Every decision, in which the subject is discussed freely, announces this doctrine. Nor can it be said that the delivery of pictures and frames under such contracts for sale by an employee of the same said foreign corporation who came for the purpose of said delivery, and, so far as appears, engaged in the business of delivering no other pictures and frames than those so sold, is not inter-State commerce.

To say that a foreign corporation might make the contracts for sale and not be allowed to deliver to the purchaser would be giving a shadow and denying the substance—would render abortive the provision of the Constitution of the United States which inhibits a State from regulating inter-State commerce. The power of Congress to regulate inter-State commerce cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered.

Gibbons vs. Ogden, 9 Wheaten, 1.
Brown vs. Maryland, 12 Wheaten, 419.
Leisy vs. Hardin, 135 U. S., 100–108.

In State vs. French, 109 N. C., 722, the Court said that "the inter-State dealings were terminated when the goods were delivered at the store of the defendants." The defendants were the purchasers of the goods. In the case before us the inter-State dealings were terminated when the pictures and frames were delivered to the purchasers, and the defendant was engaged in inter-State commerce until that delivery was completed.

It was insisted in the Courts below that the pictures and frames should not have been taken one at a time from the packages in which they came and delivered to the purchasers. That the bulk should not have been broken. How, then, could they have been delivered? Is it less inter-State commerce to deliver one picture than a box of pictures? All were shipped under contracts of sale clearly inter-State commerce. If, when a picture was taken from a package it was sold or taken for the purpose of being sold or offered for sale, then it would have lost its inter-State feature and become a portion of the general mass of the property of the State and intermingled with it; but when taken for delivery, until that delivery was made in pursuance of the contracts of sale it was not a part of the general mass of property upon which the State or a municipality, a creature of the State, had a right to place a burden.

Can a corporation or citizen of another State, making contracts of sale for pictures and frames of an inter-State character, be forced

to the inconvenience and additional expense of shipping them singly and delivering them singly. The position can be maintained neither by reason nor authority.

In re Spain, 47 Federal Reporter, page 208, decided July 8, 1891. In this case two agents of a non-resident firm were arrested presumably while delivering articles of household goods made by said firm and previously ordered by the persons to whom delivery was made. This case is identical with the case at bar in this—that the articles previously ordered were all placed in one or more boxes and consigned to the agents in bulk and were by said agents distributed. It was claimed that when the boxes were broken open for distribution the articles became intermingled with the general mass of the property of the State and were therefore taxable. The Court did not sustain this contention, but said, "It is idle to say that a non-resident may send drummers or persons to solicit sales in a sister State, but that the State may tax them for making delivery of the goods sold. * * * The right to sell implies the obligation and right to deliver."

In re Tyerman, 48 Federal Reporter, page 167, decided November 6, 1891. "The precise question was decided in favor of the petitioner in the case of Spain, 47 Federal Reporter, 208, Judge Bond saying, "The right to sell implies the obligation and the right to deliver. It is as much inter-State commerce to do the one as the other."

State vs. Coop, (S. C., July 15, 1898), 30 S. E. Reporter, page 609. In this case an agent of a non-resident company was arrested while delivering portraits and frames. It was conceded that there was no ground for his arrest for delivering the portraits, but as the agent also delivered frames which had not been specifically ordered, at the same time with the portraits, it was contended that the delivery of such frames and the receipt of the price therefor constituted the agent a peddler and rendered him amendable to the ordinance in question, but the contention was not sustained. The facts, however, in this case are different from the facts in the case at bar, for in the case at bar there was an order for the frames and portraits at the same time.

City of Laurens vs. Elmore, (S. C., July 6, 1899), 33 S. E. Rep., page 560. In this case an agent of a non-resident company was arrested while delivering enlarged photographs with their frames. It was contended that as the frames had not been previously ordered with the photographs he could be arrested for selling the frames. This contention was not sustained. In the dissenting opinion it was conceded that if the frames had been sold and delivered in pursuance of the contract for delivery of enlarged photographs such sale and delivery would have constituted inter-State commerce and would have come under the principles announced in the majority opinion.

Upon the reasoning of the cases which have been cited and in

accordance with the principles enunciated in them the tax imposed by the City of Greensboro upon the defendant was a direct burden upon inter-State commerce and was therefore beyond the power of the city.

CHAS. M. STEDMAN,

W. R. PLUM,

Attys for Pltff in Error.

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No. 266.

Brf. of Scales

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FILED
APR 5 1902
JAMES H. McKENNEY,
Clerk.

Filed April 5, 1902.

BRIEF OF DEFENDANT IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 266.

E. M. CALDWELL, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA AND THE CITY OF GREENSBORO.

BRIEF OF DEFENDANT IN ERROR.

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vs.

THE STATE OF NORTH CAROLINA AND THE CITY OF GREENSBORO.

The only question involved is, "Does the license tax imposed in the ordinance interfere with or impose a burden upon inter-state commerce, and is said ordinance unconstitutional as being in conflict with Article I, Section 8 of the Constitution of the United States?

The two offences denounced by the ordinances are: 1st. The business of selling pictures, etc. 2nd. The business of delivering pictures, etc., and no discrimination is made in favor of the residents of the City of Greensboro or of the State of North Carolina.

In the State Supreme Court the defendant's counsel lays down the proposition that no state has the right to levy a tax on inter-state commerce in any form, and cites in support thereof the following cases:

Lyng vs. Michigan, 135 U. S., 165.
Leloup vs. Port of Mobile, 127 U. S., 640.
Gibbons vs. Ogden, 9 Wheaton, 1–222.
State Freight Tax Cases, 15 Wallace, 232–279.
Robbins vs. Shelby Taxing District, 120 U. S., 480.
Brennan vs. Titusville, 153 U. S., 289–303.
Stoutenburg vs. Hennick, 129 U. S., 141–148.

Asher vs. Texas, 128 U. S., 129.
Freight Discrimination Cases, 95 N. C., 428–434.
State vs. French, 109 N. C., 722.
Adkins vs. City of Richmond, 47 L. R. A., 583.

That this is true is freely admitted. The case at bar, however, can be easily distinguished from every case cited.

Here the pictures and frames are shipped in large packages to the Chicago Portrait Company, and not to the purchasers. The packages are delivered to the defendant at his hotel in Greensboro, and the original packages broken, and the manufacture of the articles completed by putting the pictures into the frames and tacking the backs on. The defendant then delivers the pictures and frames, one at a time, to the purchasers, and until received by those contracting to purchase, the title to the said articles remained in the Chicago Portrait Company. The contract was executory. The sale was only completed when the pictures and frames were delivered and accepted. Tiedman on Sales, Sections 88 and 89. The carrier was the agent of the shipper and not of those contracting to purchase.

Lyng vs. Michigan, 135 U. S., 165,

is a case in which the beer was sold in the original package; as also is

Leisy vs. Hardin, 135 U. S., 100,

relied on by defendant.

Leloup vs. Port of Mobile, 127 U. S., 640,

holds that a State or municipality cannot impose licence tax on telegraph company doing an inter-state business.

Gibbons vs. Ogden, 9 Wheaton, 1–222,

holds that an act of the Legislature of New York, granting to Robert R. Livingston and Robert Fulton the exclusive right of navigation by steamboats of all waters within the jurisdiction of that State, is inoperative so far as it prohibits vessels licensed by the United States doing a coasting trade by means of steamboats.

State Freight Tax Cases, 15 Wallace, 232–279,

decides that a statute of Pennsylvania imposing a tax upon freight taken up within the State and carried out of it, or taken up with-

out the State and brought within it, is repugnant to the Constitution of the United States.

Robbins vs. Shelby Taxing District, 120 U. S., 480,

holds that a state cannot tax a drummer of a non-resident soliciting orders.

Brennan vs. Titusville, 153 U. S., 289–303,

is a case in which the pictures and picture frames were shipped to those contracting to purchase, and not to the manufacturers themselves, as in the case at bar.

Stoutenburg vs. Hennick, 129 U. S., 141–148,

holds that a drummer of a Baltimore house cannot be required to pay a license tax in the District of Columbia.

Asher vs. Texas, 128 U. S., 129,

decides that a drummer of a Louisiana house cannot be required to pay a license tax in Texas.

Freight Discrimination Cases, 95 N. C., 428,

holds that the Legislature of North Carolina cannot regulate charges made by railroads for transporsation of freight from one state to another.

State vs. French, 109 N. C., 722,

holds that the North Carolina purchase tax is not repugnant to the United States Constitution.

Adkins vs. City of Richmond, 47 L. R. A., 583,

holds that a broker for a non-resident, that is, a local drummer, is not liable for a license tax, where the orders are sent to the non-resident and the goods shipped to the purchaser.

In the case at bar the goods belong to and are in the possession of the Chicago Portrait Company, after arrival at Greensboro, within the State of North Carolina; they are taken to a temporary warehouse, to-wit: the room of the plaintiff in error, and the manufacture completed, and thus the goods become mixed with the

general mass of property of the State by the action of the Portrait Company.

Machine Company vs. Gage, 100 U. S., 678.
Ewert vs. Missouri, 156 U. S., 296.
Range Company vs. Carver, 118 N. C., 328.

The Company did not elect to ship the pictures and frames to those contracting to purchase, as it might have done, and as was done in the case of

Brennen vs. Titusville supra.

"As soon as the goods are in the State, and become part of its general mass of property they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of

Brown vs. Houston, 114 U. S. 622.

"When goods are sent from one State to another for sale or in consequence of a sale they become part of its general property and amenable to its laws, provided that no discrimination be made against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are."

Brown vs. Houston, supra.
Machine Company vs. Gage, 100 U. S. 676.

"But to tax the sale of such goods, or the offer to sell them before they are brought into the State is a very different thing and seems to us clearly a tax on Inter-State commerce itself."

Robbins vs. Shelby, Taxing District, supra.

The ordinance complained of here does not discriminate against goods from another State and does not attempt to prevent the "offering for sale" goods from another State. The plaintiff in error was convicted of the offence of "engaging in the business of delivering pictures" without a license.

"And it was laid down by the great Magistrate which presided over this court for more than a third of a century that the point of time when the prohibition ceases and the power of the State to tax commerce is not the instant when the article enters the country *but when the importer has so acted upon it* that it has become incorporated and mixed up with the mass of property in the country *which happens when the original packages is no longer such in his*

hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property and a tax which finds the article already incorporated with that mass by the act of the importer, etc." [Italics ours.]

Leisy vs. Hardin, supra.

"The rule deducible from the authorities seems to be that if the dealings or transactions are between parties in different States, or the transportation of freight or passengers from one State to another, a tax by a State law is prohibited, irrespective of whether there is discrimination or not, but when the tax is on an occupation carried on in the State or on property therein, the State has power to levy the tax, unless it discriminates against the articles brought from other States, with the sole exception that the sale of such articles in the original package cannot be taxed by the State. Even this exception which is laid down in Leisy vs. Hardin, 135 U. S. 100, is strongly controverted by the able dissenting opinions of Justices Gray, Harlan and Brewer in that case."

State vs. French, 109 N. C., 722.

The business of the plaintiff in error was that of completing the manufacture of the pictures as delivered, delivering the framed pictures when so finished and receiving the money from the purchasers. He found the goods in Greensboro, the property of his employer. He had nothing to do with taking the orders. It was entirely a North Carolina business.

A. M. SCALES,

Atty for City of Greensboro.

Supreme Court of the United States.

No. 54.—October Term, 1902.

E. M. Caldwell, Plaintiff in Error, vs. The State of North Carolina and the City of Greensboro. } In error to the Supreme Court of the State of North Carolina.

[January 12, 1903.]

At June term, 1900, of the Superior Court of Guilford County, State of North Carolina, E. M. Caldwell was tried before a court and jury for an alleged offense in having engaged in the business of delivering pictures without having first obtained a license so to do. The jury found a special verdict as follows:

"The business mentioned in the ordinance following is not named in the charter of the city, other than in the above section.

"That the following is an ordinance duly passed by the board of aldermen of the city of Greensboro under and by virtue of the foregoing section of said charter, and prior to any of the orders being taken:

'Be it ordained by the board of aldermen of the city of Greensboro, North Carolina:

'That every person engaged in the business of selling or delivering picture frames, pictures, photographs or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of ten dollars for each year.

'Any person engaging in said business without having paid the license tax required herein, shall be fined twenty dollars, and each and every sale or delivery shall constitute a separate and distinct offense.'

"That neither the defendant, The Chicago Portrait Company, nor any of the employees of the Chicago Portrait Company, have paid the city any license tax.

"If, upon the foregoing facts, the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise they say that he is not guilty.

"That on the — day of ——, 1900, the defendant, being employed by the Chicago Portrait Company, a foreign corporation, of Chicago, Ill., came to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employees of the Chicago Portrait Company, who had preceded the defendant in Greensboro;

"That the defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., addressed to the Chicago Portrait Company,

carried these packages to the rooms of the defendant in the Woods House, a hotel in the city of Greensboro, and there broke the bulk, placing said pictures in their proper frames and from this point delivered the pictures one at a time to the purchasers in the city of Greensboro;

"The defendant had been engaged in this work two days when arrested;

"That section 57 of the charter of the city of Greensboro, N. C., is as follows:

'That in addition to the subjects listed for taxation, the aldermen may levy a tax on the following subjects, the amount of which taxed, when fixed, shall be collected by the collector of taxes, and if it be not paid on demand, the same may be recovered by suit, or the articles upon which the tax is imposed, or any other property of the owner may be forthwith distrained and sold to satisfy the same, namely:

'21. Upon all subjects taxed under Schedule B, chapter one hundred and thirty-six, Laws of North Carolina, session of one thousand eight hundred and eighty three, not heretofore provided for, shall pay a license or privilege tax of ten dollars. And the board of aldermen shall have power to impose a license tax on any business carried on in the city of Greensboro, not before enumerated herein, not to exceed ten dollars a year.'"

Upon this special verdict the court adjudged that defendant was guilty, and sentenced him to pay a fine of $20.00 and costs of the action. From this judgment the defendant appealed to the Supreme Court of North Carolina. That court, Faircloth, C. J., and Clark, J., dissenting, on February 19, 1901, affirmed the judgment of the Superior Court; and thereupon the cause was brought to this court by a writ of error allowed by the Chief Justice of the Supreme Court of North Carolina.

Mr. Justice SHIRAS delivered the opinion of the Court.

It might fairly be contended that, upon the facts found by the special verdict, the defendant was not guilty of engaging in the business of delivering pictures without a license, within the purview of the ordinance in question. But as the Supreme Court of North Carolina has held otherwise we must accept that conclusion as a question of construction belonging to that court. Our task is to determine whether the ordinance, as so construed, is invalid as an attempt to interfere with and to regulate interstate commerce, and can be speedily performed, for we think the case falls within previous decisions of this court on this subject.

Such decisions are numerous, but we do not deem it necessary to refer to but a few of them.

The subject was elaborately considered in *Robbins* v. *Shelby Taxing District*, (120 U. S. 489.) The case was brought here on a writ of error to the Supreme Court of Tennessee, which had held valid a statute of that State, by which it was enacted that "all drummers and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein by sample, shall be

required to pay to the county trustee the sum of $10 per week or $25 per month for such privilege, and no license shall be issued for a longer period of three months." Robbins, the plaintiff in error, was a citizen and resident of the city of Cincinnati, Ohio, and was convicted of having offered for sale articles of merchandise belonging to a firm in Cincinnati without having procured a license. In his discussion of the case Mr. Justice Bradley stated the following principles, as already established by this court: The Constitution of the United States, having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation; that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom; that the only way in which commerce between the States can be legitimately affected by State laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, health and comfort of persons and the protection of property, and imposes taxes upon persons residing within the State or belonging to its population, and upon vocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States; and imposes taxes upon all property within the State, mingled with and forming part of the great mass of property therein; but that, in making such internal regulations, a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and not become part of the common mass of property therein; and no discrimination can be made, by such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce.

Upon these established principles the conclusion was reached that the State statute in question was invalid, and the following observations are pertinent to the question before us:

"It would not be difficult to show that the tax authorized by the State of Tennessee is discriminative against the merchants and manufacturers of other States. They can only sell their goods in Memphis by the employment of drummers and by means of samples, whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not sub-

ject to any tax therefor. They are taxed for their licensed houses, it is true, but so, it is presumable, are the merchants and manufacturers of other States in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such undoubtedly was one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a State can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes which led to it. If the selling of goods by sample and the employment of drummers for that purpose injuriously affect the local interests of the States, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it, for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant or retaliatory enactments of forty different States. The confusion into which the commerce of the country would be thrown by being subject to State legislation on this subject would be but a repetition of the disorder which prevailed under the articles of confederation."

Asher v. *Texas*, (128 U. S. 128,) was a case where a State statute required from "every commercial traveller, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax," and such legislation was declared inoperative, so far as it affected one soliciting orders for a business house in another State. The same doctrine was held in *Stoutenberg* v. *Hemmick*, (129 U. S. 141,) in the case of an agent of a Maryland business house soliciting orders in the District of Columbia without having taken out a license as required by an act of the legislative assembly, of the District of Columbia.

In *Lyng* v. *Michigan*, (135 U. S. 161,) the general proposition was repeated:

"We have repeatedly said that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In *Crutcher* v. *Kentucky*, (141 U. S. 47,) an act of the State of Kentucky, which forbade the agent of an express company, not incorporated by the laws of that State, from carrying on business without first obtaining a license from the State, was held to be a regulation of commerce and invalid. Mr. Justice Bradley, speaking for the court, said:

"The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulation of interstate commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of State regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void."

In *Brennan* v. *Titusville*, (153 U. S. 289,) was again presented the question of the validity of an ordinance providing "That all persons canvassing or soliciting, within the city of Titusville, orders for goods, books, paintings, wares or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the treasurer therefor certain sums, according to the time for which said licenses shall be granted," and also prescribing a penalty for failing to procure such license. An agreed statement of facts showed that Shepard was a manufacturer of picture frames and maker of portraits, residing in Chicago in the State of Illinois, of which State he was a citizen, and in which State he had his manufactory and place of business; that in the prosecution of his business he employed agents, who, under his directions, solicited orders for pictures and picture frames in the State of Pennsylvania and in other States of the Union, by going personally to residents and citizens of said State of Pennsylvania and other States, and exhibiting samples of his pictures and frames, going, when necessary, from house to house; that Brennan was an agent of the said Shepard, employed by him to travel and solicit orders for pictures and frames, upon a salary; that upon receiving orders for pictures and picture frames, the agents of Shepard forwarded the same to him at Chicago, where the goods were made, and from there shipped to the purchasers in Titusville by railroad freight and express, and the price of said goods was collected and forwarded by the express companies and sometimes by the agents to said Shepard at Chicago; that Brennan, the agent employed by Shepard, was engaged in conducting the business in the manner stated, at the time of his arrest, and acting solely for Shepard.

Upon such a state of facts, and upon a review of the cases, this court held it was not bound by the decision of the highest court of the State in which such a tax was authorized and imposed that such a tax was an exercise of the police power, and not of the taxing power; and that the ordinance in question imposed a tax upon interstate commerce, and was therefore void. To the argument that no discrimination was made in the ordinance between domestic and foreign drummers, the court said:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax*, (15 Wall. 232.) The negotiations of the sale of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods in London or New York, because, in the one case it is an act of foreign, and in the other of interstate commerce, both of which are subject to regulation by Congress alone."

The last case we shall cite is the recent one of *Stockard* v. *Morgan*, (185 U. S. 27,) where was considered the validity of a statute of the State of Tennessee providing for the collection of a privilege tax on the occupation of merchandise brokers. By agreement of the parties two questions only were argued in the State court: (1) whether or not the complainants, who had filed a bill to restrain the collection of the tax, were merchandise brokers and subject by the statute to tax as such; (2) whether or not their business constituted interstate commerce, and therefore was beyond the reach of the State's taxing power. The State Supreme Court held that the complainants, as merchandise brokers, were within the meaning of the statute, and that the tax was a valid one under the Constitution of the United States.

This court, though recognizing that it was obliged to accept the construction put upon the statute by the State court, reversed the judgment of that court in respect to the nature of the commerce as interstate. In the opinion of the court, delivered by Mr. Justice Peckham, the principal cases, beginning with *Brown* v. *Maryland*, (12 Wheat. 419,) and ending with *Brennan* v. *Titusville*, were again reviewed, and the conclusions there reached were affirmed.

The State Supreme Court endeavored to distinguish the present case from that of *Brennan* v. *Titusville*, in the following observations:

"The defendant insists that *Brennan* v. *Titusville* is directly in point—is, in every essential fact, this case—and should control the opinion of the court in this appeal. And it is in many respects like this case, but there is one material difference between that case and this, which marks the distinction. In that case, the goods were shipped directly to the purchaser. In this case, they were shipped by the Chicago company to itself in the city of Greensboro; and when they reached Greensboro, the defendant as the agent of the Chicago company received them from the railroad at its depot, carried them to their rooms in Greensboro, opened the boxes in which they were shipped, took out the pictures and picture frames, assorted and put them together, and delivered them to the purchasers in the city of Greensboro, and had been engaged in this work two days when arrested. If they had been completed and shipped directly to the parties for whom

they were intended, this case would have fallen directly within the decision of *Brennan* v. *Titusville*, and we should hold, as it was held there, that it was an interference with interstate commerce, and that the defendant was not guilty. But to our minds there is a decided difference between this case and that. The contract to make and deliver these pictures was an executory contract, and no title passed by this contract. If they had been completed in Chicago, and under the contract shipped to the purchasers, the title would have passed to the consignee upon delivery to the railroad in Chicago—the railroad being deemed to be the agent of the consignee, and *Brennan* v. *Titusville* would have applied, as the tax would have been upon the commerce. But, instead of completing the pictures in Chicago and shipping them to the parties who had contracted for them, they were shipped to themselves, 'The Chicago Portrait Company,' in Greensboro. This being so no title ever passed from the Chicago Portrait Company, until the pictures were put in their frames and delivered by the defendant. These pictures belonged to the Chicago company when they were shipped from Chicago, and belonged to it when they got to Greensboro. And the question is, could the Chicago Portrait Company, because it was a foreign corporation, engage in the business of completing these pictures, and in selling and delivering them in Greensboro, without becoming liable to a city tax, for which its own citizens would be liable. It seems to us that it could not."

We are not persuaded by this reasoning. It seems to proceed upon two propositions—first, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the senders in Greensboro.

But it certainly cannot be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vendor out of the State or on the purchaser within the State. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce beyond the reach of the taxing power of the State. It is too plain for argument that the supposed incomplete condition of articles of commerce, if shipped directly to the purchasers, cannot subject them to the license tax.

But we are not disposed to concede that, under the facts of this case, the pictures were, in any proper sense, incomplete when received in Greensboro. That the frames and the pictures were in separate packages, if such was the case, was merely for convenience in packing and handling, and "placing the pictures in their proper places," (the language of the verdict,) meant that each picture was placed in the frame designed for it. The selection of the frame was as much a part of the purchase and sale as the selection of the picture.

Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the

vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to State taxation. The same could be said if the vendor himself, or by a personal a8ent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate.

Transactions between manufacturing companies in one State, through agents, with citizens of another constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from State taxation, but if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution.

It cannot escape observation that efforts to control commerce of this kind, in the interest of the States where the purchasers reside, have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation.

Upon principle and authority, therefore, we conclude that the judgment of the Supreme Court of North Carolina should be and is *reversed, and the cause is remanded to that court to take further proceedings not inconsistent with this opinion.*

True copy.

Test:

Clerk Supreme Court, U. S.